

# 9-19.000

## DOCUMENTARY MATERIAL HELD BY THIRD PARTIES

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## 9-19.200

### Introduction

This chapter focuses on the means by which federal prosecutors may obtain, for evidentiary purposes, documentary material believed to be in the possession of disinterested third parties. These provisions have been drafted to be consistent with the previously published Attorney General "Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties" (*see* 28 C.F.R., Part 59, as well as with Section 201 of Title II of the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-11).

The intent of the regulations (28 C.F.R., Part 59) is to protect against unnecessary invasions of personal privacy and to recognize the potential for such invasions when the government seeks to obtain documentary materials from third parties not themselves under investigation. The general thrust of these guidelines is that a search warrant should not be used to obtain documentary materials from a non-suspect, except where the use of a subpoena or other less intrusive means would jeopardize the availability or usefulness of the materials sought.

When a search warrant is sought, different provisions apply depending on whether the person from whom the materials are sought is: (1) a disinterested third party (*see* USAM 9-19.210); (2) a disinterested third party who is a physician, lawyer, or clergyman (*see* USAM 9-19.220 and 230); or (3) a person possessing the materials sought for the purposes of public communication (e.g., a newspaper, book, or broadcast) (*see* USAM 9-19.240). This third provision is regulated directly by statute (42 U.S.C. § 2000aa). For definitions used in this chapter, *see* the Criminal Resource Manual at 660.

### **9-19.210 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party**

Normally a search warrant should not be used to obtain documentary materials held by disinterested third party. A search warrant may be sought, however, if the use of a subpoena or other less intrusive means would substantially jeopardize the availability or usefulness of the materials sought. Except as provided in USAM 9-19.220, the application for such a warrant must be authorized by an attorney for the government. "Attorney for the government" is defined in the regulations as having the same meaning as found in Rule 54(c) of the Federal Rules of Criminal Procedure and includes all United States Attorneys and Assistant United States Attorneys. In addition, the Department takes the position that the phrase "an authorized assistant of the Attorney General" set forth in Rule 54(c) as part of the definition of the term "attorney for the government" is broad enough to include all Department of Justice attorneys assigned to investigate or prosecute cases and their supervisors.

An exception to the authorization requirement may be made in emergency situations, where the immediacy of the need to seize the materials does not permit an opportunity to secure authorization from the attorney for the government. In such situations the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency. However, the United States Attorney or supervising Department of Justice attorney (in a case in which a division of the Department is directly handling the investigation or prosecution) must be notified of the authorization and its justifying basis within 24 hours of the authorization. 28 C.F.R. § 59.4(a).

### **9-19.220 Procedures Where Privileged Materials Sought Are in Possession of a Disinterested Third Party Physician, Lawyer, or Clergyman**

A similar but somewhat different procedure is followed when the disinterested third party is a physician, lawyer, or clergyman and the materials sought or other materials likely to be reviewed during the execution of the search warrant contain confidential information concerning patients, clients, or parishioners that was furnished or developed for the purposes of professional counseling or treatment. As with other disinterested third parties, a search warrant should normally not be used to obtain such confidential materials. A warrant should be used only if the use of a subpoena, or other less intrusive means of obtaining the materials, such as a request, (1) would substantially jeopardize the availability or usefulness of the materials sought; (2) access to the materials is of substantial importance to the investigation or prosecution for which they are sought; and (3) the application of the warrant has been approved by the appropriate Deputy Assistant Attorney General (DAAG) upon the recommendation of the United States Attorney or supervising Department of Justice attorney (in a case in which a division of the Department is directly handling the investigation or prosecution). The appropriate DAAG would be a DAAG for the division which supervises the underlying offense being investigated or prosecuted.

If the documentary materials were created or compiled by a physician but, as a matter of practice, the physician's files are maintained at a hospital or clinic, the files, for purposes of these regulations, are to be deemed in the private possession of the physician; therefore, the regulations would apply if the physician is a disinterested third party. Such records would, however, not be deemed in the private possession of the physician if the hospital or clinic itself were a suspect.

Again, an exception to the authorization requirement may be made in emergency situations where there is an immediate need to seize the materials and not enough time to secure DAAG approval. In such situations, the application may be authorized by the United States Attorney or the supervising Department of Justice attorney. However, the appropriate DAAG must be notified of the authorization and its justifying basis within 72 hours of the authorization. However, in these cases (physician, lawyer, or clergyman), there is no provision for an emergency authorization by a supervisory law enforcement officer in the applicant's department or agency (as

is the case where the materials sought are held by other disinterested third parties). 28 C.F.R. § 59.4(b)(1) and (2).

### **9-19.221 Request for Authorization to the Deputy Assistant Attorney General**

Where the materials sought are in the possession of a disinterested third party physician, lawyer, or clergyman, application for a warrant must be approved by the appropriate Deputy Assistant Attorney General as described in 9-19.220. The request for authorization from the Deputy Assistant Attorney General should be made in writing and include a copy of the warrant application as well as a brief description of the facts and circumstances that form the basis for the recommendation of the authorization. In addition, the request must include a statement that it is authorized by the United States Attorney or the supervising Department of Justice attorney. If the request for authorization is made orally, or if, in an emergency situation, the application is authorized by the United States Attorney or the supervising Department of Justice attorney, a written record, as described above, must be sent to the Deputy Assistant Attorney General within seven days. 28 C.F.R. § 59.4(b)(3).

### **9-19.230 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party Professional Involved in a Doctor-Like Therapeutic Relationship**

There may be additional third-party professionals (e.g., psychologists, psychiatric social workers, or nurses) who possess materials containing private information similar to that held by doctors. The regulations are intended to cover these relationships as well. In such cases, the United States Attorney (or supervising Department of Justice attorney) should determine whether a search for such materials would involve review of extremely confidential information furnished or developed for purposes of professional counseling or treatment, and if it would, the provisions described in USAM 9-19.220 for obtaining materials from physicians, lawyers, or clergymen must be followed. At a minimum, the requirements for third party search warrants described in USAM 9-19.210 must be observed in all cases. 28 C.F.R. § 59.4(b)(5).

### **9-19.240 Procedures Where Materials Sought Are in Possession of a Person Who Holds Them in Relation to Some Form of Public Communication**

Search warrants directed at seizure of any work product materials or other documentary materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication are governed by Title I of the Privacy Act of 1980, 42 U.S.C. § 2000aa, *et seq.* See Criminal Resource Manual 9-19.241 for the text of 42 U.S.C. § 2000aa. Such warrants can only be sought under very special circumstances, which include the authorization of a Deputy Assistant Attorney General. The statute must be followed closely. Questions as to such searches should be directed to the Policy and Statutory Enforcement Unit, Office of Enforcement Operations at (202) 514-1077.

### **9-19.300 Considerations Bearing on Choice of Methods**

The guidelines set forth certain factors to be considered in determining whether the use of a subpoena or other means less intrusive than a search warrant would substantially jeopardize the availability or usefulness of the materials sought. These factors are set forth in 28 C.F.R. § 59.4(c).

## **9-19.400 Non-Applicability in Certain Situations**

The guidelines do not apply to certain types of investigatory activities and searches. These include audits; examinations; regulatory, compliance, or administrative inspections; foreign intelligence or counterintelligence activities by a government authority pursuant to otherwise applicable law; border and customs searches; access to documentary materials for which valid consent has been obtained; and access to documentary materials that have been abandoned at a known location or that cannot be obtained by a subpoena because they are in the possession of a person whose identity is not known and cannot be determined with reasonable effort.

The guidelines do not supersede any other statutory, regulatory, or policy limitations on access to or the use or disclosure of particular types of documentary materials.

## **9-19.500 Sanctions**

Any Federal officer or employee who violates the guidelines set forth in 28 C.F.R. § 59 is subject to appropriate disciplinary action by the agency or department by which he/she is employed. *See* 28 C.F.R. § 59.6.

## **9-19.600 Criminal Tax Offenses**

Where the warrant application involves a search for evidence of a criminal tax offense under the jurisdiction of the Tax Division, the warrant must be specifically approved in advance by that Division pursuant to USAM 6-4.130. 28 C.F.R. § 59.4, footnote 1.

## **9-19.700 Contact Points for Advice and Approval**

In all cases involving offenses supervised by the Criminal Division, all questions as to these regulations and the Privacy Protection Act, as well as inquiries concerning the Deputy Assistant Attorney General's authorization, should be directed to the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations, at (202) 514-1077.

For offenses under the jurisdiction of the Tax Division, contact the Chief of the appropriate regional Criminal Enforcement Section of the Tax Division.

For offenses under the jurisdiction of the Civil Rights Division, contact the Chief of the Criminal Section of the Civil Rights Division at (202) 514-3204.

For offenses under the jurisdiction of any other division contact the office of the Assistant Attorney General or Deputy Assistant Attorney General for the appropriate division.